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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 821

LAS VEGAS HACIENDA, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 40–57) is reported at 298 F. 2d 430. The findings and order of the Civil Aeronautics Board (Pet. App. 4–39) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1962, and a petition for rehearing was denied on February 23, 1962. The petition for a writ of certiorari was filed on March 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where the findings showed that petitioner was offering regularly scheduled interstate air transportation as part of a single-price package tour, the Civil Aeronautics Board correctly held that petitioner was engaged in "the carriage by aircraft of persons * * * for compensation or hire", within the meaning of Section 101(21) of the Federal Aviation Act.

2. Whether the court of appeals improperly deferred to the Board in affirming its determination that petitioner's package tour operations were within the statutory definition of "air transportation" contained in Section 101(21) of the Federal Aviation Act.

3. Whether the Board's cease and desist order which was couched in the language of the statutory prohibition and which incorporated by reference the Board's findings and conclusions was invalid as either so vague or broad that it failed to apprise petitioner of the conduct enjoined.

STATUTES INVOLVED

The provisions of the Federal Aviation Act principally involved are set forth in the Appendix (*infra*, pp. 15–16).

STATEMENT

Petitioner was charged with engaging in interstate air transportation "as a common carrier [of persons] for compensation or hire" (Section 101(21), Federal Aviation Act) without appropriate certificate authority from the Board, in violation of Section 401(a) of the

Act (Pet. App. 6, 35). After a full administrative hearing, the Board found the following facts:[1]

Petitioner, a corporation, operates a resort hotel and gambling casino at Las Vegas, Nevada. Since early 1958 petitioner has conducted single-price package tours from Los Angeles to its establishment in Las Vegas (Pet. App. 9–10).[2] The tour includes regularly scheduled air carriage, which petitioner advertises as "free," and also various goods and services at petitioner's hotel.[3] The price of the tour from Los Angeles, which includes the round-trip air transportation, is $27.50 (Pet. App. 13). Round trip fares for certificated carriers are $39.20 first class, $30.50 coach (Pet. App. 25, 46). Petitioner's books attribute no income to the sale of the transportation as such and carry the expense of its transportation activities as part of the

[1] The findings and conclusions of the examiner were adopted by the Board (Pet. App. 36).

[2] Previous to 1958 such flights had been conducted by a separate corporation formed by petitioner for that purpose. This corporation had handled all phases of the tours except the physical operation of the aircraft which was provided by carriers under contract with it. The Board found that the separate corporation was operating as an indirect air carrier (49 U.S.C. 1301(3)), and ordered it to cease and desist. *Hacienda Hotels—U.S. Aircoach Enforcement*, 26 C.A.B. 372 (1958). Petitioner was not a party to that proceeding and within a month of issuance of the Board's order petitioner took over the operation (Pet. App. 10–11).

[3] These included use of the petitioner's golf course, participation in a "hole-in-one contest," and a buffet dinner at the hotel. Also included were a bottle of champagne and a $5.00 rebate in cash to be spent for food, drink or gambling (Pet. App. 12–13).

general operating expense of the hotel (Pet. App. 14, 47).

The aircraft on which the tour patrons are flown are owned by petitioner and operated by petitioner's uniformed employees. Flights depart from regular commercial airports and passengers receive the regular air-terminal services: a check-in counter, boarding passes, flight calls, the assistance of ground attendants and ground transportation between the airport at Las Vegas and petitioner's hotel (Pet. App. 12–13, 45). Patrons are solicited from the general public through advertisements on radio and in newspapers and brochures, and the tours are sold both through petitioner's own ticket offices and through travel and tour agents who also sell tickets for regularly scheduled passenger lines (Pet. App. 12, 46). Petitioner's travel agents have advised prospective patrons that they need not be guests at petitioner's hotel to be eligible to purchase the tour and one agent emphasized that petitioner's fare was less than that of the certificated air carriers (Pet. App. 21, 46).

In April 1959, petitioner increased the frequency of its service between Los Angeles and Las Vegas (Pet. App. 10). In July 1959, about a month after filing of the Board's complaint, petitioner extended its

service to Las Vegas from Santa Ana, California, making six round trips a week, and from Ontario, California, operating primarily on weekends. In October 1959, it initiated four-times-a-week flights between San Francisco and Las Vegas, using pressurized aircraft (Pet. App. 10–11).

The Board found that petitioner's "service has been and is being held out to the general public" (Pet. App. 20), that "air transportation is by far the most important item in the package" and is, in fact, "the principal inducement for purchase of the tour" (Pet. App. 25), that the "tour is one, entire, and indivisible" (*ibid.*) and that "the price which the patron pays for the package must be considered as including compensation for transportation" (Pet. App. 22). It held that petitioner could not "avoid regulation under Section 401 * * * [by] sever[ing] one of a number of items from the tour package and elect[ing] not to charge for it while charging for all the other items of the tour * * *" (Pet. App. 22). The Board accordingly concluded that petitioner was "a common carrier for compensation or hire" (Section 101(21), *infra*, p. 16). Since petitioner did not hold appropriate authority to engage in air transportation (Section 401(a), *infra*, p. 16), the Board entered a cease and desist order (Pet. App. 33–34).

The court of appeals affirmed in all respects material here (Pet. App. 40–57).[4] It said (*id.* 47–48):

> * * * in the present case the air transportation was intended to be, and undoubtedly was, the principal inducement for the purchase of the package. The Act would be ineffective indeed if its economic regulations could be avoided simply by selling transportation only in combination with something else and calling it free. The Board was not compelled to adopt such a self-defeating construction of the statute.

The court also rejected petitioner's claim that the Board's order was too broad and vague, holding that the order read in relation to the complaint and opinion of the Board "will sufficiently apprise the petitioners of the conduct complained of, and now enjoined" (Pet. App. 55).

ARGUMENT

The instant case was correctly decided below and presents no question warranting review.

1. Both from an operational and a competitive standpoint petitioner's transportation is virtually indistinguishable from that provided by any duly au-

[4] The Board's order was also directed to Henry F. Price, manager of the petitioner's "flight division" and president of petitioner's separate corporation involved in the prior enforcement proceeding (see *supra*, p. 3, n. 2). The court of appeals deleted Price from the order on the ground that there was insufficient evidence in the record that he participated in "holding out * * * that the flights were available to the general public for compensation or hire" (Pet. App. 57). The government has not sought review of this determination.

thorized air carrier. Yet petitioner claims that its operations are beyond the scope of the economic regulatory provisions of the Federal Aviation Act. Its contention is that it is not engaged "as a common carrier for compensation or hire" (Section 101(21) of the Act, *infra*, p. 16) because it does not charge for transportation which it furnishes in furtherance of its principal hotel and entertainment business (Pet. 2). But the Board found to the contrary (Pet. App. 22, 25) and, as the court of appeals noted in accepting that finding, petitioner "did not furnish transportation for nothing more than the hope or expectation of some generalized business advantage; it imposed a direct charge upon its customers for the transportation in combination with other goods and services" (Pet. App. 48).[5]

The situation here is not unlike that in *Herbert v. Shanley Co.*, 242 U.S. 591, 594–595, in which the Court, in rejecting a claim that musical compositions were not performed "publicly for profit" in the public dining room of a hotel, observed that the perform-

[5] Indeed, petitioner informs the Court that its operations are competitive with those of the certificated airlines, and that in excess of 7,000 persons each month are transported under such package tour plans (Pet. 8–9). The record shows that petitioner had been steadily expanding its operations (Pet. App. 10–11).

[6] Package tours or excursions by all forms of transportation are commonplace, and have generally been regarded as involving common carriage for compensation from a regulatory standpoint. One-price tours available only to the guests of a hotel likewise have long been so regarded. *E.g., Shores and Brown Common Carrier Application*, 26 M.C.C. 243; *Huff Common Carrier Application*, 16 M.C.C. 159, 27 M.C.C. 643.

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ances were "a part of a total for which the public pays and the fact that the price of the whole is attributed to a particular item which those present are expected to order [i.e., meals] is not important."

Apparently accepting the Board's finding that it made a charge for the transportation, petitioner argues variously that its air carriage services are still immune from economic regulation either because the charge is not separately stated or because it does not cover petitioner's costs or provide a profit (Pet. 7–20). In support of the latter contention, petitioner argues that "compensation," as used in the Federal Aviation Act, means a charge sufficient to cover the cost of transportation and "hire," one which provides a profit (Pet. 11–12).[1] There is, however, no warrant for such a restrictive interpretation which, as a practical matter, would exempt many substantial transportation enterprises from economic regulation. As the court of appeals found from a review of the legislative history and objectives of the Act, petitioner's construction of the statute is "self-defeating"[2]

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[1] See, also, *Ollendorff Watch Co.* v. *Pink*, 279 N.Y. 32, 17 N.E. 2d 676, 677, and *E. I. du Pont de Nemours & Co.* v. *Kaufman & Chernick Co.*, 337 Mass. 216, 148 N.E. 2d 634, 636, which recognize, as did the court below, that payment for an item which includes another alleged to be free constitutes payment for both.

[2] For this "technical meaning" (Pet. App. 10) which petitioner would ascribe to the Federal Aviation Act, petitioner cites no federal cases and relies on state decisions interpreting standards to be applied under differing local regulatory schemes. As the court below indicated (Pet. App. 48, n. 16), such cases are not decisive of the proper interpretation of "for compensation or hire" as used in the Federal Aviation Act.

and would render it "ineffective indeed" (Pet. App. 48). The evident congressional purpose was to provide for regulation of "the furnishing of transportation by air to the general public on a commercial basis" (*ibid.*). The Board's interpretation of "for compensation or hire," according to the Court, "makes effective economic regulation * * * possible by bringing within the regulatory scheme all those who compete in the commercial market in the business of offering air transportation to the public generally" (Pet. App. 45). This holding is in accord with the views recently expressed by this Court with respect to the terms "for compensation" and "for hire" in *United States v. Drum*, 368 U.S. 370, 375, where the Court said: "Because the definitions must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal."[*]

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[*] There is no merit to petitioner's contention (Pet. 18–20) that it is not subject to economic regulation under the Act because its tours are operated "in the conduct or furtherance of a business or vocation." As the court of appeals noted, merely because this language appears in the definition of "air commerce" (§ 101(20)), which is subject to safety regulation, but does not appear in the definition of "air transportation" (§ 101 (21)), which is subject to economic regulation, it does not follow that Congress intended to exempt common carriage from economic regulation wherever it was shown that in some aspect it was carried on "in the * * * furtherance of a business or vocation" (Pet. App. 49). The two definitions serve entirely different ends. "There is nothing to indicate that Congress intended that the statutory definitions applicable to the coverage of one should limit the other, and it would subvert the economic purposes of the Act to hold that they do" (Pet. App. 50). The

2. There is nothing to the contention that the court of appeals improperly deferred to the Board's determination. The court expressly recognized that the "Board is [not] left at large to extend or limit the coverage of the economic regulations of the Act as it may deem expedient" (Pet. App. 53). The court accordingly made a careful review of the facts, the precedents and the Act's legislative history, and upheld the Board's determination upon finding (Pet. App. 46):

> * * * the record contained substantial support for the Board's conclusion that [petitioner] was a "common carrier for compensation or hire," as the Board correctly defined that statutory phrase.

The court's statement that it should go no further (Pet. App. 44) was but a recognition of the general rule laid down by this Court with respect to the appropriate scope of judicial review. *E.g., United States* v. *Drum*, *supra*, 368 U.S. at 376; *Labor Board* v. *Hearst Publications*, 322 U.S. 111, 131.[10]

3. The Board's order requires petitioner to cease and desist from engaging in air transportation in vio-

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exclusion of the language from the definition of "air transportation" means no more than "that Congress decided that the economic coverage of the Act should be co-extensive with air common carriage—that it should include transportation conducted in furtherance of a business when it was common carriage, and should exclude it when it was not" (*ibid.*).

[10] *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, cited by petitioner (Pet. 21), is not to the contrary. The Court there simply found, in effect, that the administrative decision was at variance with the statute's "unequivocal" legislative history (321 U.S. at 150) and was unreasonable (321 U.S. at 151).

lation of Section 401(a), *i.e.*, without obtaining a certificate of public convenience and necessity.[11] Petitioner's contention that this is too "broad and uncertain" (Pet. 23) under this Court's decision in *Labor Board* v. *Express Publishing Co.*, 312 U.S. 426, rests upon the assumption that it enjoins all conceivable activities which might constitute "air transportation" within the meaning of the Act. The assumption is incorrect. The Board itself expressly stated in its opinion (which was incorporated as part of the order) that the order is not to be so construed, pointing out, in response to petitioner's objections to its breadth, that the activities "which are prohibited" are those set forth in the initial decision (which was adopted by the Board) and that "[a]ny possible doubt as to what constitutes the enjoined operations, or comprises any concomitant phase thereof, can be resolved by reference to that decision" (Pet. App. 36, n. 2).[12] While expressing its

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[11] The text of the Board's order which was identical to the examiner's proposed order (Pet. App. 33–34) provides:

> A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the entire record, having issued its opinion, containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;
>
> It is Ordered, That on and after 12:01 a.m., EDST, October 11, 1960, Las Vegas Hacienda, Inc., its agents, successors and assigns, and Henry F. Price, individually and as agent and/or manager of the flight division of Las Vegas Hacienda, Inc., cease and desist from engaging directly or indirectly in air transportation within the meaning of Sections 101(10) and 101(21) of the Federal Aviation Act of 1958, in violation of Section 401(a) of the Act.

[12] The Board's findings and conclusions were incorporated into the order by specific reference (Pet. App. 33–34).

view that greater precision was desirable in the drafting of orders, the court of appeals agreed that this construction of the order "will sufficiently apprise the petitioners of the conduct complained of, and now enjoined" (Pet. App. 55). In determining the scope of an order, this Court has read "the order in its relation to the circumstances of th[e] case * * *." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 52; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 423–425. Moreover, the Board's orders are not self-executing but rather must be enforced by a district court (Sections 902, 1007, 49 U.S.C. 1472, 1487) and a violation of the order must be shown.

Under varying guises petitioner's package tour flight operations have been twice found illegal by the Board over a short span of time. "It would not appear incumbent on the Board at this time to tell the petitioner how far it can go without breaking the law" a third time. *Consolidated Flower Shipments, Inc.—Bay Area* v. *Civil Aeronautics Board*, 213 F. 2d 814, 818 (C.A. 9). As in *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F. 2d 29, 31 (C.A. 7), petitioner can have "no doubt of the evils complained of and sought to be corrected."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1962.

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 *et seq.*) are:

DEFINITIONS

SEC. 101. [72 Stat. 737, 49 U.S.C. 1301] As used in this Act, unless the context otherwise requires—

* * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

* * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * *

(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the oper-

ation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

* * * * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

* * * * *

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

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